Supreme Court, U.S.
FILED
APR 25 2011
OFFICE OF THE CLERK

No. 10-1017

In The
Supreme Court of the United States

BRICE M. GEORGE, ROBERT STEVENSON, IVORY GRACE
PETITIONERS,

v.

STATE OF LOUISIANA,
RESPONDENT.

On Petition for a Writ of Certiorari to the
Louisiana Fourth Circuit Court of Appeal,
State of Louisiana

REPLY TO THE STATE OF LOUISIANA'S BRIEF IN OPPOSITION

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REPLY BRIEF

The State of Louisiana, like the Government in *United States v. Welch*, No. 10-314 (pending),[1] does not dispute the importance of the fundamental constitutional question presented regarding the scope of *Almendarez-Torres*'s[2] prior conviction exception to *Apprendi*.[3] *See Brief for the United States in Welch v. United States*, No. 10-314. The United States itself has also conceded that the federal courts of appeals and state courts of last resort are openly divided over this issue. *Id.* at 6. Nor does the *State's Brief in Opposition* (hereinafter the *State's BIO*) assert that the issue does not arise with regularity throughout the state and federal system. And contrary to the State's suggestion, these cases suffer from absolutely no procedural problems. Accordingly, Petitioners' cases present an excellent vehicle for resolving this important Sixth Amendment issue regarding the scope of the right to trial by jury.

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[1] The Seventh Circuit's decision in *Welch v. United States* is reported at 604 F.3d 408 (7th Cir. 2010).

[2] *Almendarez-Torres v. United States*, 523 U.S. 224 (1998).

[3] *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

1. There are no procedural problems with the Petition. While, the *State's BIO* suggests that these cases might suffer from a procedural defect because Petitioners waived constitutional challenges to their prior misdemeanor convictions by pleading guilty in those prior "petty offense" cases,[4] the State misconstrues the nature of Petitioners' claim. *See State's BIO* at 4-6.

Petitioners have no quarrel with the fact that they had no right to a jury trial on their prior possession of marijuana, first offense charges when the only penalty they faced was a maximum of six months in jail. At that time, due to the limited penalty they were facing, the cases fit within that category of "petty offenses" to which this Court has held that the Sixth Amendment right to trial by jury does not apply. *See Duncan v. Louisiana*, 391 U.S. 145, 159 (1968); *see also Baldwin v. New York*, 399 U.S. 66 (1970); *District of Columbia v. Clawans*, 300 U.S. 617, 624 (1937); *Callan v. Wilson*, 127 U.S. 540, 557 (1888).

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[4] Although it makes no legal difference, the State of Louisiana is factually incorrect in asserting "each of the petitioners pleaded guilty at least twice to possession of marijuana, first offense." *State's BIO* at 5. Petitioner Brice George was first convicted of possession of marijuana at a judge trial. On the same day, and immediately after seeing how the judge handled this trial, Mr. George pled guilty to a second charge of possession of marijuana, first offense, pending before the same judge.

Rather, Petitioners' challenge is to the later use of their prior possession of marijuana to impose a sentence to which the Sixth Amendment's jury trial guarantee most assuredly does attach -- up to twenty years, representing a nineteen and a half year increase -- without granting them the right to trial by jury on that issue. Indeed, petitioners could not properly have challenged Louisiana's enhancement scheme or demanded jury trials on the basis of potential future enhanced charges during the prior "petty offense" charges because any such challenge would have been premature and speculative – i.e. not ripe. *See Blanton v. N. Las Vegas*, 489 U.S. 538, 545 n.12 and accompanying text (1989) (declining to consider possible future enhanced penalties for repeat offenses that have not yet been charged in determining whether the charge is a "petty offense" not subject to the Sixth Amendment right to trial by jury).

As the *State's BIO* makes clear, when the State sought to increase the maximum sentence to a level to which the Sixth Amendment's jury trial guarantee does apply, Petitioners timely filed written objections raising the precise issue presented here, and properly preserved those objections for review by this Court. Accordingly, not only are there no procedural problems here, but the petition presents the appropriate vehicle for resolving this

important Sixth Amendment issue regarding the scope of the right to trial by jury.[5]

2. The *State's BIO* erroneously argues that Louisiana law affords a jury determination on the essential elements because in Orleans Parish the practice is to place the prior misdemeanor adjudication before the felony jury. *See State's BIO* at 26-28. The argument is not only legally unsound, but was rejected by the Louisiana Supreme Court. If the New Jersey legislature had amended the statute at issue in *Apprendi* to permit the state to prove to a judge pre-trial that the offense at issue was a hate-crime, and then submitted to the jury the question whether a judge had made that finding, no reasonable jurist would have accepted this emendation. Accordingly, the State's position that Louisiana avoids the *Apprendi* problem by placing the issue of whether the judge previously found the pertinent fact before the jury is flawed.

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[5] This Court has also commented in this context on the "vast difference" between a guilty plea at a proceeding honoring the right to trial by jury and fact-finding from proceedings involving only a judge. *See Apprendi v. New Jersey*, 526 U.S. at 496 ("Moreover, there is a vast difference between accepting the validity of a prior judgment of conviction entered in a proceeding in which the defendant had the right to a jury trial and the right to require the prosecutor to prove guilt beyond a reasonable doubt, and allowing the judge to find the required fact under a lesser standard of proof.").

Moreover, omitted from the State's *BIO* is that the state made precisely this argument to the Louisiana courts, and the Louisiana courts expressly declined to rule on that basis. The Louisiana Supreme Court specifically responded to this contention by the State by noting:

> While it is arguable, as the State contends, that the fact that the prior misdemeanor conviction must be submitted to and found by a jury beyond a reasonable doubt takes the Louisiana statute outside the literal rule of *Apprendi*, we do not base our decision in this case solely on this argument, but on a consideration of the principles underlying *Apprendi* and the implications of those principles for the Louisiana statutory scheme.

State v. Jefferson, 26 So. 3d 112, 120 n.7 (La. 2009). Thus, the Louisiana Supreme Court opinion upon which the Louisiana Court of Appeal decision in these cases relies expressly declined to rule on the argument presented in part IV of the *State's BIO*. Rather, the Louisiana courts squarely rested their rulings in these cases on their interpretation of *Apprendi* and *Almendarez-Torres* with respect to the issue presented by Petitioners – whether the constitutional right to trial by jury is violated when prior non-jury triable adjudications are used to increase the maximum sentence from six months to twenty years. Regardless, the State's position is an argument for merits consideration of the case.

3. The *State's BIO* reflects the widespread disagreement regarding the scope of *Almendarez-Torres*'s prior conviction exception to *Apprendi* which this Court should resolve. In sum, the State maintains that as long as an accused receives all of the procedural protections to which they are constitutionally entitled at the prior proceeding, regardless of whether those procedures include the right to trial by jury, then the outcome of that proceeding is sufficiently reliable to be used to increase the maximum sentence at a later adult felony criminal proceeding. This ably presents and is precisely the sum and substance of the position taken by those espousing the pro-*Almendarez-Torres* view, such as the *Welch* majority, *see Welch*, 604 F.3d at 425-29, which emphasizes *Almendarez-Torres*'s prior conviction exception. *See also United States v. Jones*, 332 F.3d 688 (3d Cir. 2003); *United States v. Smalley*, 294 F.3d 1030 (8th Cir. 2002).

The countervailing interpretation of this Court's *Almendarez-Torres*, *Jones*, and *Apprendi* line of cases is exemplified by Judge Posner's dissent in *Welch*, *see Welch*, 604 F.3d at 430-32 (Posner, J. *dissenting*), as well as the Ninth Circuit majority's opinion in *United States v. Tighe*, 266 F.3d 1187 (9th Cir. 2001). These authorities emphasize *Apprendi*'s holding that any fact that increases the maximum sentence to which an accused is exposed must be subject to the fundamental triumvirate of notice, proof beyond a reasonable doubt, and the right to trial by jury. Under this pro-*Apprendi* approach, *Almendarez-Torres*'s "prior conviction exception," if a

true exception at all, is limited to those circumstances where the prior conviction was obtained at proceedings honoring *Apprendi* and its fundamental triumvirate, particularly the right to trial by jury. *See, e.g., Welch, supra* at 430-32 (discussing whether an adjudication from a military commission for alleged terrorists could be used to enhance a later conviction of a conventional crime). Ultimately, the State's attempt to parse the language and even the particular points of emphasis in this Court's opinions in *Almendarez-Torres*, *Jones*, and *Apprendi*, *see State's BIO* at 13-20, simply emphasizes the lack of clarity and intractability between these two divergent views of this Court's jurisprudence in this area.[6] Indeed, the Louisiana

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[6] Similarly, the State's confusion concerning whether this Court has already resolved this issue, *State's BIO* at 7-13, only reinforces the need for this Court to grant *certiorari* in order to squarely address the issue. While both sides in the debate forcefully espouse their view regarding whether this Court's *Almendarez-Torres – Apprendi* jurisprudence does or does not permit the use of non-jury trial adjudications to increase the maximum sentence in a later proceeding, none of these divergent opinions even suggest that this Court has squarely resolved this issue. Like the *State's BIO* (and Petitioners' Petition, for that matter), the lower courts have been left to try to divine the answer by analyzing general principles and parsing oblique references in cases not directly presenting or addressing the issue. Of the cases cited by the State in support of its novel position, *Blanton* explicitly left the question open. *See Blanton*, 489 U.S. at 545 n.12 ("In

Supreme Court has somewhat schizophrenically espoused both of these contradictory views -- on the one hand relying on *Apprendi* in prohibiting the use of juvenile adjudications to enhance a later criminal conviction due to the lack of the right to a jury trial, while on the other hand emphasizing *Almendarez-Torres*'s prior conviction exception to permit the use of non-jury triable adult petty offense convictions to enhance a later criminal conviction.[7]

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light of petitioners' status as first-time offenders, we do not consider whether a repeat offender facing enhanced penalties may state a constitutional claim because of the absence of a jury trial in a prior DUI prosecution."). *Almendarez-Torres* addressed only prior adult felony convictions, where the right to trial by jury was honored. *Jones* and *Apprendi*, as well as the post-*Apprendi* cases cited by the State, *see State's BIO* at 13, do not address the use of prior adjudications at all.

[7] The State's attempt to dismiss the split in authority -- by recasting the federal appeals court decision in *Tighe* and the Louisiana Supreme Court's decision in *State v. Quincy Brown, 879 So. 2d 1276 (La. 2004)* as based on the unique nature of juvenile adjudications as opposed to *Apprendi* and the lack of honoring the Sixth Amendment's jury trial guarantee, *see State's BIO* at 21-25, -- also merits little attention. Both courts' opinions make it perfectly clear that these decisions were squarely based on *Apprendi* and the lack of the right to a jury trial rather than the fact that the predicates were juvenile adjudications. *See Tighe*, 266 F.3d at 1194-95 ("In sum, we conclude *Apprendi's* narrow "prior conviction"

4. The *State's BIO* makes clear that the issue has fully percolated within the lower courts.[8] See *State's BIO* at 21 (asserting the 9th Circuit "stands alone" in espousing the view that *Apprendi* prohibits

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exception is limited to prior convictions resulting from proceedings that afforded the procedural necessities of a jury trial and proof beyond a reasonable doubt. Thus, the "prior conviction" exception does not include nonjury juvenile adjudications. Therefore, the district court violated *Apprendi* when, at sentencing, it increased *Tighe's* penalty beyond the prescribed statutory maximum based on an adjudication which denied *Tighe* the right to a jury trial. *See Apprendi*, 530 U.S. at 489; *Jones*, 526 U.S. at 243 n. 6, 249." [footnote omitted]); *State v. Brown*, 879 So. 2d 1276, 1290 (La. 1004) ("Because a juvenile adjudication is not established through a procedure guaranteeing a jury trial, it cannot be excepted from *Apprendi*'s general rule; the use of these adjudications to increase the penalty beyond the statutory maximum violates the defendant's Due Process right guaranteed by the Fourteenth Amendment of the United States Constitution."). At most, the State's suggestion that *Tighe, Brown* and Judge Posner's dissent in *Welch* are cabined to, and premised upon, the unique nature of juvenile offenses, is a basis to grant certiorari in this case.

[8] Nor does the State dispute that this issue has widespread significance for the operation of the Armed Career Criminal Act (ACCA), though concededly views concerning the use of state petty offenses as an element of federal offenses may more properly be in the purview of the Solicitor General.

the use of non-jury triable adjudications as elements of an offense). *See id* at n. 12 (noting six state courts that have "interpreted the exception to the rule of *Apprendi* to embrace prior adult misdemeanor convictions."). That the State claims more circuits and state courts on the State's side of the issue is not a reason to refrain from granting certiorari, but rather a reflection of the deeply entrenched split within the circuit courts.

Given the importance and recurring nature of the issue and that it has been fully developed in the lower courts over an extended period of time, it is time for the Court to resolve this issue, and Petitioners' cases provide an excellent vehicle for doing so.

As Judge Posner ultimately put it recently after surveying the lower courts' various opinions regarding the use of non-jury triable adjudications to enhance a subsequent criminal offense:

> Only the Supreme Court can decide authoritatively what its decisions [in this area] mean . . .

Welch, 604 F.3d at 432 (Posner, J. *dissenting*).

CONCLUSION

For the foregoing reasons, and those set forth in Petitioner's original Petition as well as in the *Amicus Brief of the National Association of Criminal Defense Lawyers*, the petition for writ of certiorari should be granted.

Respectfully Submitted

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